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Public Prosecutor v Thi Jun Tatt

B HIGH COURT (PENANG) — CRIMINAL TRIAL NO PA-45A-70–10 OF 2017
LIM CHONG FONG J
23 NOVEMBER 2018

C *Criminal Law — Dangerous drugs — Possession — Drugs found in pocket of accused's short trousers and in accused's car — Whether prosecution proved prima facie case against accused — Dangerous Drugs Act 1952 ss 12(2) & 39A(1)*

D On 28 February 2017 at about 4.30am, a team of policemen led by Mohd Hafiz bin Ahmad, the raiding officer ('SP4') conducted reconnaissance operation in front of a shophouse row along Lorong Baiduri 1, Taman Segemal, Mak Mandin, Butterworth, Pulau Pinang for about 15 minutes. They saw the accused walking to the front of the Teik Kee Bah Kut Teh shop and stood there
E for several minutes. Upon physical body search on the accused, SP4 found a black plastic package bag which contained four transparent plastic packets of crystalline and powdery substances suspected to be syabu in the left pocket of accused's short trousers. SP4 also found a bunch of car keys with a remote control in the right pocket of the accused's short trousers. Subsequently the
F accused led the team of policemen to a Toyota Camry car bearing registration No CCQ 8088 ('the car') which was parked beneath Blok Rumah Pangsa Taman Segemal, Mak Mandin, Pulau Pinang behind the Teik Kee Bah Kut Teh shop. Upon searching the interior of the car, SP4 found a yellow plastic package bag which contained 12 transparent packets of crystals suspected to be syabu
G beneath the gearbox console. Accordingly, the team of policemen brought the accused and the case materials to the Narcotics Division of the IPD Seberang Perai Utara, Pulau Pinang and were handed over to Nur Rafida bt Mustapah, the investigating officer ('SP5'). After testing and analysis, it was found that the drugs that were seized from the accused's short trousers comprised of 74.49g
H methamphetamine and the drugs that were seized from the car comprised of 25.69g methamphetamine ('the drugs'). Consequently, the accused was charged for trafficking under s 39B of the Dangerous Drugs Act 1952 ('the Act') ('the first charge') and possession under s 12(2) of the Act ('the second charge'). It ought to be noted that the grounds of judgment were only confined
I to the second charge.

Held, discharging and acquitting the accused on the second charge:

(1) The place of incident of the offence as alleged by the prosecution starkly differed from that stated in the second charge. The evidence adduced by

the prosecution through SP4 conflicted with the second charge as specified in a material way and this was consequently fatal to the prosecution's case. The prosecution and the defence had both conducted their respective cases differently from that stipulated in the second charge. This could not be excused or sanctioned. It was also not curable under s 156 of the Criminal Procedure Code (see paras 45–46).

(2) The actus reas was proved because the accused had physical control; to wit, the power to deal with the drugs to the exclusion of all other persons. However, there was no direct evidence adduced by the prosecution to infer that the accused had knowledge of the existence of that portion of the drugs in the car. In other words, the mens rea of the accused had to be established by way of the surrounding circumstantial evidence (see para 49).

(3) It was inconclusive the accused had exclusive access and usage of the car because there was also another set of car keys of an Audi car found in the car. There was therefore likelihood that the car was not accessible and used by the accused alone. Consequently, it could not be safely ascertained that it was the accused who had placed that portion of the drugs beneath the gear console of the car. In this regard, SP5 had failed to thoroughly investigate into the users of both the car as well as the Audi car. Inadequate investigation by SP5 on this aspect was fatal to the prosecution's case. In the absence of proof of exclusive car access, the accused could not have the knowledge or mens rea of the existence for that portion of the drug's concealed in the gear box console (see para 51).

(4) The prosecution had failed to prove that the accused was in possession of that portion of the drugs on maximum evaluation and therefore failed to prove a prima facie case against the accused in respect of the second charge (see paras 52–53).

[Bahasa Malaysia summary

Pada 28 Februari 2017 pada jam 4.30 pagi, satu pasukan polis yang diketuai oleh Mohd Hafiz bin Ahmad, pegawai rusuhan ('SP4') menjalankan operasi peninjauan di hadapan sebuah barisan kedai di Lorong Baiduri 1, Taman Segemal, Mak Mandin, Butterworth, Pulau Pinang selama kira-kira 15 minit. Mereka melihat tertuduh berjalan ke depan kedai Teik Kee Bah Kut Teh dan berdiri di sana selama beberapa minit. Semasa carian badan secara fizikal ke atas tertuduh, SP4 menemui beg plastik plastik hitam yang mengandungi empat paket plastik lutsinar bahan kristal dan serbuk yang disyaki sebagai syabu di poket kiri seluar pendek tertuduh. SP4 juga mendapati segugus kunci kereta dengan alat kawalan jauh di dalam poket kanan seluar pendek tertuduh. Selepas itu, tertuduh membawa pasukan polis ke kereta Toyota Camry dengan nombor pendaftaran CCQ 8088 ('kereta') yang diletakkan di bawah Blok Rumah Pangsa Taman Segemal, Mak Mandin, Pulau Pinang di belakang kedai

Teik Kee Bah Kut Teh. Setelah memerikasa bahagian dalam kereta, SP4 menemui beg plastik berwarna kuning yang mengandungi 12 paket kristal lutsinar yang disyaki syabu di bawah konsol kotak gear. Sehubungan itu, pasukan polis membawa tertuduh dan bahan kes kepada Bahagian Narkotik IPD Seberang Perai Utara, Pulau Pinang dan diserahkan kepada Nur Rafida bt Mustapah, pegawai penyiasat ('SP5'). Selepas ujian dan analisis, didapati bahawa dadah yang dirampas daripada seluar pendek tertuduh terdiri daripada 74.49g methamphetamine dan dadah yang dirampas dari kereta terdiri daripada 25.69g methamphetamine ('dadah'). Akibatnya, tertuduh didakwa melakukan pengedaran di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta') ('pertuduhan pertama') dan pemilikan di bawah s 12(2) Akta ('pertuduhan kedua'). Perlu diambil perhatian bahawa alasan penghakiman hanya terhad kepada tuduhan kedua.

Diputuskan, melepaskan dan membebaskan tertuduh atas pertuduhan kedua:

(1) Tempat kejadian kesalahan itu sebagaimana yang didakwa oleh pihak pendakwaan berbeza dengan yang dinyatakan dalam pertuduhan kedua. Keterangan yang dikemukakan oleh pihak pendakwaan melalui SP4 bertentangan dengan pertuduhan kedua sebagaimana yang dinyatakan dengan cara yang material dan akibatnya fatal kepada kes pendakwaan. Kedua-dua pihak pendakwaan dan pembelaan telah menjalankan kes-kes masing-masing secara berbeza daripada yang ditetapkan dalam pertuduhan kedua. Ini tidak boleh dimaafkan atau dibenarkan. Ia juga tidak boleh disembuhkan di bawah s 156 Kanun Prosedur Jenayah (lihat perenggan 45–46).

(2) Actus reas telah dibuktikan kerana tertuduh mempunyai kawalan fizikal; iaitu, kuasa untuk menangani dadah dengan mengecualikan semua orang lain. Walau bagaimanapun, tidak ada keterangan langsung yang dikemukakan oleh pihak pendakwaan untuk membuat kesimpulan bahawa tertuduh mempunyai pengetahuan tentang kewujudan sebahagian dadah di dalam kereta. Dalam erti kata lain, mens rea tertuduh perlu dibuktikan dengan cara bukti keadaan sekeliling (lihat perenggan 49).

(3) Adalah tidak meyakinkan bahawa tertuduh mempunyai akses eksklusif dan penggunaan kereta tersebut kerana terdapat juga satu lagi kunci kereta kereta Audi yang terdapat di dalam kereta. Maka terdapat kemungkinan bahawa kereta itu tidak diakses dan digunakan oleh tertuduh sahaja. Akibatnya, ia tidak dapat dipastikan dengan selamat bahawa ia adalah tertuduh yang telah meletakkan sebahagian dadah di bawah konsol gear kereta. Dalam hal ini, SP5 gagal menyiasat sepenuhnya pengguna-pengguna kereta dan juga kereta Audi. Penyiasatan yang tidak mencukupi oleh SP5 mengenai aspek ini adalah fatal kepada kes pendakwaan. Dalam ketiadaan bukti akses eksklusif

kereta, tertuduh tidak boleh mempunyai pengetahuan atau mens rea tentang kewujudan sebahagian dadah yang tersembunyi dalam konsol kotak gear (lihat perenggan 51).

(4) Pihak pendakwaan telah gagal untuk membuktikan bahawa tertuduh mempunyai pemilikan sebahagian dadah itu pada penilaian maksimum dan oleh itu gagal membuktikan kes prima facie terhadap tertuduh berkenaan dengan pertuduhan kedua (lihat perenggan 52–53).]

Notes

For cases on possession, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 313–320.

Cases referred to

Ahmad Mukamal bin Abdul Wahab & Ors v PP [2014] 1 MLJ 865; [2013] 4 CLJ 949, CA (refd)
Akhbar Jafarisshonestani Mohamad v PP [2014] 5 MLJ 827, CA (refd)
Azmer bin Mustafa v PP [2014] 3 MLJ 616, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Balachandran v PP [1991] 3 MLJ 426, SC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (folld)
Formi Afta bin Ahmad & Anor v PP [2014] 1 MLJ 838; [2013] 9 CLJ 183, CA (refd)
Ghasem Gharezadehsharbiani Hassan v PP [2014] 5 MLJ 433; [2014] 1 LNS 752, CA (refd)
Goh Min Han v PP [2015] MLJU 40, CA (refd)
Hassan Nawali v PP [2018] MLJU 1989; [2018] 6 CLJ 415, CA (refd)
Inoma Afuekwe Vivian lwn Pendakwa Raya [2017] MLJU 731, CA (refd)
Mohammed Sulaiman Sahulhameed v PP [2015] 2 MLJ 406, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Norazalee bin Maliki v Pendakwa Raya [2002] MLJU 155; [2002] 1 LNS 8, HC (refd)
Ooi Chee Seong & Anor v PP [2014] 3 MLJ 593; [2014] 7 CLJ 505, CA (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Pendakwa Raya v Miss Masana and Anor [2010] MLJU 1058; [2011] 10 CLJ 639, HC (refd)
Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (folld)
Periasamy v PP [1966] 1 MLJ 138, HC (refd)
Prasit Punyang v PP [2014] 4 MLJ 282; [2014] 7 CLJ 392, CA (refd)
PP v Arinze Alex Ugenyt & Anor [2017] MLJU 297, HC (refd)
PP v Chew Yoo Choi [1990] 2 MLJ 444, HC (refd)
PP v Chung Tshun Tin & Ors [2008] 1 MLJ 559; [2007] 10 CLJ 527, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)

A *PP v Lam San* [1991] 3 MLJ 426, SC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 4 CLJ 2086, SC (refd)
PP v Saare Hama & Anor [2001] 4 MLJ 480; [2001] 4 CLJ 475, HC (refd)
Samsuri bin Tumin lwn Pendakwa Raya [2011] 6 MLJ 358, CA (refd)
Surentheran a/l Selvaraja v PP [2006] 1 MLJ 641, CA (refd)
B *Thivasalim a/l Abdul Majeed v PP* [2014] 3 MLJ 124; [2014] 2 CLJ 693, CA (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (refd)

C **Legislation referred to**

Criminal Procedure Code ss 153(1), 156, 180
Dangerous Drugs Act 1952 ss 12(2), 37(da)(xvi), (h), First Schedule
Evidence Act 1950 s 45

D *Selvaranjini Selvaraja (Public Prosecutor, Penang State Legal Advisor's Office) for the prosecution.*
Hussaini bin Abdul Rashid (Hussaini & Co) for the defendant.

E **Lim Chong Fong J:**

PRELIMINARY

[1] The accused, Thi Jun Tatt, a 27 year old Malaysian is charged for the following offences:

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> Bahawa kamu pada 28 Februari 2017 jam lebih kurang 4.30 pagi, bertempat di hadapan kedai Teik Kee Bah Kut Teh Lorong Baiduri 1, Taman Segemal, MakMandin, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 74.49 gram dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama. ('First Charge')

G

and

H

> Bahawa kamu pada 28 Februari 2017 jam lebih kurang 4.30 pagi, bertempat di hadapan kedai Teik Kee Bah Kut Teh Lorong Baiduri 1, Taman Segemal, Mak Mandin, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah ada dalam milikan kamu dadah berbahaya iaitu Methamphetamine seberat 25.69 gram dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39A(1) Akta yang sama. ('Second Charge')

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[2] The first charge is the subject matter of Criminal Trial No PA-45A-74–10 of 2017 whilst the second charge is the subject matter of

Criminal Trial No PA-45A-70–10 of 2017. Both charges were tried jointly. The trial of the prosecution's case took four days on 7–8 June 2018 and 24 and 26 July 2018. Exhibits P1 to D34 were admitted in evidence during the course of the trial.

[3] The prosecution called the following witnesses:

(a) Mohd Amirulaini bin Mohd Basri ('SP1'), a constable and photographer in the Royal Malaysian Police;

(b) Mohdzir bin Man ('SP2'), a constable and storekeeper in the Royal Malaysian Police;

(c) Siti Aishah bt Che Ani ('SP3'), a chemist in the Penang branch of the Department of Chemistry, Malaysia;

(d) Mohd Hafiz bin Ahmad ('SP4'), an officer in the Royal Malaysian Police and the raiding officer;

(e) Nur Rafida bt Mustapah ('SP5'), an officer with the Royal Malaysian Police and the investigating officer; and

(f) Tee Yong Fah ('SP6'), a constable and assistant to the raiding officer.

[4] After the close of trial of the prosecution's case, both parties filed their written submissions and I heard oral submissions of counsel on 28 September 2018.

THE PROSECUTION'S SUBMISSION

[5] On 28 February 2017 at about 4.30am, a team of policemen led by SP4 conducted reconnaissance operation in front of a shophouse row along Lorong Baiduri 1, Taman Segemal, Mak Mandin, Butterworth, Pulau Pinang for about 15 minutes. They saw the accused walking to the front of the Teik Kee Bah Kut Teh shop and stood there for several minutes.

[6] SP4 approached the accused and identified himself from the police. The accused was shocked and struggling but was arrested. Upon physical body search on the accused as witnessed by the team of policemen including SP6, SP4 found a black plastic package bag which contained four transparent plastic packets of crystalline and powdery substances suspected to be Syabu in the left pocket of accused's short trousers. SP4 also found a bunch of car keys with a remote control in the right pocket of the accused's short trousers.

[7] Subsequently the accused led the team of policemen to a Toyota Camry car bearing registration No CCQ 8088 ('car') which was parked beneath Blok Rumah Pangsa Taman Segemal, Mak Mandin, Pulau Pinang behind the Teik

Kee Bah Kut Teh shop. SP4 opened the car door using the remote control retrieved from the accused. Upon searching the interior of the car, SP4 found a yellow plastic package bag with words 'Thank You' which contained 12 transparent packets of crystals suspected to be Syabu beneath the gearbox console. In addition, SP4 found the passport of the accused and a UOB chequebook in the name of the accused in the car.

[8] Accordingly, the team of policemen brought the accused and the case materials that were seized from the accused as well as the car to the Narcotics Division of the IPD Seberang Perai Utara, Pulau Pinang. The accused and the case materials were handed over to SP5 at about 8am. The packets of suspected drugs that were seized from the accused's short trousers and the car were marked as MH-A1 to MH-A4 (exh P13A (1–4)) and MB-B1 to MB-B12 (exh P15A (1–11) and P16A) respectively. In addition, SP4 lodged his police report as the complainant (exh P19).

[9] On 1 March 2017, SP5 directed SP1 to photograph the seized case materials. The suspected drugs in the packets marked as MH-A1 to MH-A4 and MB-B1 to MB-B12 were then put into separate bags marked as NR 1 and NR 2 respectively and brought by SP5 to the Penang branch of the Department of Chemistry, Malaysia for testing and analysis. They were handed to SP3.

[10] After testing and analysis, SP3 found that the drugs from packets MH-A1 to MH-A4 in bag NR1 comprised of 74.49g methamphetamine and MB-B1 to MB-B12 in bag NR2 comprised of 25.69g methamphetamine respectively ('drugs'). These are dangerous drugs listed in the First Schedule to the Dangerous Drugs Act 1952 ('the DDA'). The findings of SP3 are stated in her chemist report ref 17-FR-P-01434 dated 5 July 2017 (exh P9).

[11] SP4 then on 5 July 2017 returned all the case materials to SP5 who thereafter kept them in the store at the IPD Seberang Perai Utara, Pulau Pinang under the care of SP2 until production in court as and when required for the trial.

[12] During the course of SP5's investigation, she directed SP1 to take photographs of the car (exh P4 (A–E)) in the evening of 2 March 2017. Later that night, she went with SP5 and SP1 to the place where the accused was arrested and further directed SP1 to take photographs of the place of incident (exh P5 (A–H)). SP5 also carried out a search on the car registration in the Jabatan Pengangkutan Jalan and found that the car registered in the name of the accused. Subsequently on 7 March 2017, SP5 interrogated the accused and took his cautioned statement (exh D34).

[13] In the circumstances, the prosecution accordingly submitted that the

drugs involvedare plainly dangerous drugs as verified by SP3 who is a qualified chemist with Bachelor of Science degree in chemistry from the Universiti Kebangsaan Malaysia and Master of Science degree from the Universiti Sains Malaysia. She is also a Licentiate of the Institut Kimia Malaysia. She is experienced in identification and analysis of dangerous drugs from the course of her work as well having undergone training under a senior chemist.

[14] In the premises, SP3 is an expert pursuant to s 45 of the Evidence Act 1950 ('the EA') and her evidence ought to be accepted at face value following *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 and adopted in *Public Prosecutor v Lam San* [1991] 3 MLJ 426 as well as *Balachandran v Public Prosecutor* [1991] 3 MLJ 426.

[15] The prosecution further submitted that the accused was plainly in possession of the drugs. Possession involved two characteristics, to wit the physical and mental characteristics.

[16] In respect of the physical characteristics, the accused walked to the place of incident alone. He thereafter stood there alone for about three to four minutes. As the result of SP4's examination on the accused after his arrest, one portion of the drugs was found in the left pocket of his short trousers. There were a bunch of car keys and remote control found in the other right pocket. The accused guided the raiding team to the car that was parked about 120 metres away. The car door was opened by SP4 using the remote control found in the pocket of the accused. As the result of the search in the interior of the car, the other portion of the drugs was found beneath the gear console. In addition, the passport as well as cheque book of the accused were found in the car.

[17] Consequently, the prosecution submitted that the accused was in physical custody and control of the portion of the drugs (exh P14A (1–4)) in his short trousers pocket. There was no one else with him at the time. The aforesaid drugs were in the accused's pocket throughout the period SP4 and his team of policemen observed him. Nobody gave the aforesaid drugs to the accused and thus no one else had access to it. As to the other portion of the drugs found in the car (exh P15A (1–11) and P16A), the car was opened using the remote control held by the accused. He was therefore in control of the car. There were no else in the car at that time. There were also the accused's personal documents found in the car which plainly showed that he had custody and control of the car, hence the portion of the drugs too that were found beneath the gear console of the car. The prosecution relied on the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237.

[18] As to the mental characteristics, the prosecution submitted that this can only be inferred from the circumstantial evidence and conduct of the accused.

In this regard, the accused was plainly in physical possession of the portion of the drugs (exh P13A (1–4)) with him personally on his body. He was also shocked and he struggled when SP4 and SP6 arrested him. In respect of the other portion of the drugs (exh P15A (1–11) and P16A), the accused led SP4 and his team of policemen to the car. The car is owned and registered in the accused's name and there is no evidence that other persons had access to the car. The aforesaid drugs were also concealed beneath the gear console of the car to avoid detection.

[19] Consequently, the prosecution submitted that the accused also had the mens rea or knowledge of the presence of the drugs. The prosecution relied on the case of *Samsuri bin Tumin lwn Pendakwa Raya* [2011] 6 MLJ 358 and the recent Court of Appeal case of *Inoma Afuekwe Vivian lwn Pendakwa Raya* [2017] MLJU 731.

[20] As the result, the prosecution submitted that the accused was in possession of the drugs that were found in his short trousers pocket (exh P13A (1–4)) as well as that found in the car (exh P15A (1–11) and P16A).

[21] Accordingly, the prosecution submitted it has proved a prima facie case against the accused on the second charge for possession of the portion of the drugs found in the car.

[22] As to the portion of the drugs that was found in the short trousers pocket of the accused, the prosecution also contended that the accused trafficked the aforesaid drugs based on the presumption in s 37(da)(xvi) of the DDA. In this regard, the net weight of the methamphetamine involved is 74.49g, hence the presumption of trafficking is attracted.

[23] Accordingly, the prosecution submitted it has also proved a prima facie case against the accused on the first charge for trafficking of the portion of the drugs found on him.

THE DEFENCE'S REPLY

[24] In respect of the first charge, the defence contended that the portion of the drugs were in fact recovered from the basket of one of the motorcycles parked in front of the game shop beside the Teik Kee Bah Kut Teh shop. There was a CCTV camera that recorded the event. There were a few witnesses who saw the accused arrested including persons by name of Wong Ting Sheng and Mua Yee Sheng.

[25] The accused has in his cautioned statement denied he was in possession of the aforesaid drugs which contradicted the testimony of SP4. It was

therefore essential that SP5 investigated the matter thoroughly to establish the truth. However she failed to do so by not, amongst other things, having investigated on the CCTV and its recording as well as the interviewing the witnesses who witnessed the arrest. In addition, she did not visit the abode of the accused and confirmed what happened with his family members. She was oblivious of all these but was merely testifying that she did not know of the existence of the CCTV and presence of witnesses during the arrest. In this regard, SP5 merely treated the cautioned statement of the accused as 'lip service', to wit to just record the statement for the sake of recording and thereafter filed it in the investigation papers. The defence relied on the Court of Appeal cases of *Ahmad Mukamal bin Abdul Wahab & Ors v Public Prosecutor* [2014] 1 MLJ 865; [2013] 4 CLJ 949, *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 7 CLJ 392 and *Azmer bin Mustafa v Public Prosecutor* [2014] 3 MLJ 616 as to the result of failure to investigate the cautioned statement of the accused. That notwithstanding according to the defence, the prosecution is also vested with the duty to negate the defences raised by the accused in the cautioned statement following the Court of Appeal cases of *Akhbar Jafarisshonestani Mohamad v Public Prosecutor* [2014] 5 MLJ 827 and *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593; [2014] 7 CLJ 505 and *Mohammed Sulaiman Sahulhameed v Public Prosecutor* [2015] 2 MLJ 406. Failure to do so is fatal to the prosecution's case.

[26] In the premises, the defence submitted that the accused is deprived of a fair trial and relied on the case *Public Prosecutor v Chew Yoo Choi* [1990] 2 MLJ 444 and the Court of Appeal case of *Ghasem Gharezadehsharbiani Hassan v Public Prosecutor* [2014] 5 MLJ 433; [2014] 1 LNS 752.

[27] Finally, the defence also contended there was a material gap and hence a break in the chain of evidence presented by the prosecution. There was a glaring contradiction in that it was stated in the prosecution's opening speech, SP4's police report and the search list (exh P20) which stated that the portion of the drugs were found in the right pocket of the short trousers of the accused whereas SP4 and SP6 testified that the aforesaid drugs were found in the left pocket instead. This is fatal to the prosecution's case and the defence relied on the Court of Appeal case of *Goh Min Han v Public Prosecutor* [2015] MLJU 40 and a string of High Court cases particularly *Periasamy v Public Prosecutor* [1966] 1 MLJ 138 and *Norazalee bin Maliki v Pendakwa Raya* [2002] MLJU 155; [2002] 1 LNS 8. The defence also pointed to the Federal Court case of *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 CLJ 383 that failure to explain the discrepancy is fatal. There was also no corroborative evidence such as the conduct of the accused or DNA/fingerprints that could otherwise implicate the accused and the defence relied on the recent Court of Appeal case of *Hassan Nawali v Public Prosecutor* [2018] MLJU 1989; [2018] 6 CLJ 415 on this aspect.

[28] As the result, the defence submitted that the accused must be acquitted and discharged from the first charge by reason of the inadequacies in the prosecution's case.

[29] As to the second charge, the defence contended that the prosecution failed to prove that the accused had exclusivity to the car because the prosecution did not muster evidence that the accused alone had the car keys and he alone used the car to the exclusion of other having access and usage of the car. According to the defence, there was no evidence at all adduced to establish that the accused alone used the car. There was no evidence led to show the number of the existing car keys. There is no evidence whether there was any other person who also used the car. This is fatal according to the defence based on the Supreme Court case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086 as well as the case of *Pendakwa Raya v Miss Masana and Anor* [2010] MLJU 1058; [2011] 10 CLJ 639 and *Formi Afta bin Ahmad & Anor v Public Prosecutor* [2014] 1 MLJ 838; [2013] 9 CLJ 183.

[30] The absence of the aforesaid evidence is attributed to the absence of investigation on these aspects as conceded by SP5. It is plain that SP5 did not asked the accused in the course of investigations whether the accused or someone else placed the portion of the drugs beneath the gear console of the car. She did not asked who else used the car. She did not ask how many sets of keys were present. The investigation by SP5 was therefore unsatisfactory.

[31] According to the defence, the accused cannot be penalised for lack of ingenuity in investigation by SP5 that deprived him of the time honoured benefit of doubt and reliance is made to the Supreme Court case of *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 and the Court of Appeal case of *Ghasem Gharezadehsharbiani Hassan v Public Prosecutor*.

[32] That notwithstanding, the defence further submitted that the prosecution could not also rely on the presumption in s 37(h) of the DDA because the portion of the drugs found in the car was not in a compartment specially constructed for the purpose to hide drugs following *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480; [2001] 4 CLJ 475 and *Public Prosecutor v Arinze Alex Ugenyt & Anor* [2017] MLJU 297.

[33] Consequently, the defence submitted that the accused must be discharged and acquitted on the second charge because the accused was not in the car at the material time of the arrest and his exclusivity of usage of the car has not been established by the prosecution.

FINDINGS OF THE COURT AT THE CLOSE OF THE PROSECUTION'S CASE

[34] The grounds of judgment here are only confined to the second charge in Criminal Trial No PA-45A-70–10 of 2017. My duty at the close of the prosecution's case is provided in s 180 of the Criminal Procedure Code as follows:

> 180 Procedure after conclusion of case for prosecution
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> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
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> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
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> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
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> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[35] Augustine Paul JCA (later FCJ) explained the meaning of prima facie case as follows in the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown by evidence in rebuttal ... The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must

A be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

B

Subsequently Gopal Sri Ram JCA (later FCJ) provided the following guiding principles in the Federal Court case of *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457:

C 8. For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close the prosecution's case:

(i) the close of the prosecution's case, subject the evidence of led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all D reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his E defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

F (iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82.

G **[36]** Hence, I am required to conduct a maximum evaluation test on the prosecution's evidence in its entirety, including the assessment of the credibility of witnesses called by the prosecution and the drawing of inferences admitted by the prosecution's evidence. If the prosecution's evidence admitted two or more inferences, the one that is more favourable to the defence is generally to H be accepted unless the silent or some other circumstantial evidence otherwise discloses a compelling inference that points to the guilt of the accused.

[37] The second charge is pursuant to s 12(2) of the DDA which reads:

I No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.

In the Court of Appeal case of *Surentheran a/l Selvaraja v Public Prosecutor* [2006] 1 MLJ 641, Abdul Aziz Mohamad JCA (later FCJ) held as follows:

> [1] The appellant was convicted in the Sessions Court in Kuala Lumpur of the offence under s 12(2) of the Dangerous Drugs Act 1952 of unlawful possession of 6.44g of a mixture of heroin and monoacetylmorphines and was sentenced under s 39A(2) to ten years imprisonment and the mandatory minimum ten strokes of whipping. The High Court dismissed his appeal against conviction and sentence. He now appeals to this court. The appeal is also as regards conviction and sentence.
>
> ...
>
> [9] In arguing against the finding, made at the close of the case for the prosecution, of knowledge and therefore of possession, Encik Karpal Singh relied on the decision of this court in *Toh Su Kuan v Pendakwa Raya* (Rayuan Jenayah No D-05–82 Tahun 1998) where the circumstances were very much stronger against the appellant in that case than those in this case and this court held that they were insufficient to constitute proof of possession. The appellant in that case was charged with the capital offence of trafficking in 1,584.93g of heroin and was sentenced to death in the High Court. The evidence for the prosecution was that the drug was found in 356 packets in different parts of the appellant's person: 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back. This was what Gopal Sri Ram JCA said:
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> > In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew the packets contained heroin, the drug which forms the subject matter of the charge.
>
> [10] There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances. For that reason we consider that the decision in Toh Su Kuan is not relevant for our deliberations.

[38] In short, the prosecution must based on the totality of the evidence adduced including the credibility of the witnesses prima facie prove that the accused has in his possession dangerous drugs as defined in the DDA. Upon the prosecution having so established the same, the accused may then rebut by proving that he is authorised to be in possession of the dangerous drugs under the DDA or regulations made thereunder.

[39] In respect of the nature or identity of the drugs, I observed that the defence did not mount any challenge on it. That notwithstanding, I am satisfied from the evidence led by the prosecution that the drugs seized are methamphetamine that weighed 25.69g as per the second charge based on SP3's testimony. Moreover, she confirmed that the portion of the drugs seized from the car is dangerous drugs as stipulated in the DDA. SP3 is a qualified and experienced chemist and I have no reason from her testimony before me not to accept her expert evidence on the analysis of that portion of the drugs at face value. In *Munusamy v Public Prosecutor*, Mohd Azmi SCJ held as follows:

> ... As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine its identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copyright or ballistic experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the Court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step ...

This has been followed by subsequent cases including *Public Prosecutor v Lam San* as well as *Balachandran v Public Prosecutor* as alluded to by the prosecution.

[40] I am also satisfied that there is no break in the evidential chain of movement of that portion of the drugs seized from the car from their seizure by SP4 until ultimate production in court based on the collective testimonies of SP4, SP5, SP3 and SP2.

[41] Consequently, I find and hold that the prosecution has proved that the portion of the drugs seized from the car is indeed dangerous drugs on maximum evaluation.

[42] As to the possession of that portion of the drugs seized from the car, the law on possession is settled and well stated by Abdul Aziz Mohamad FCJ in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194 as follows:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in

possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

[17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28:

> … It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions

[18] Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed), at p 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[43] As to the second charge, I have meticulously read its contents and find that the place of incident as stated therein is synonymous with that in the first charge; to wit, in front of the Teik Kee Bah Kut Teh shop. The particulars of the charge must be sufficiently set out as required by s 153(1) of the Criminal Procedure Code which reads follows:

> 153 Particulars as to time, place and person
>
> (1) The charge shall contain such particulars as to the time and place of the alleged

offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the manner with which he is charged.

[44] However I observed that the prosecution through SP4 led evidence that the yellow plastic bag which contained 12 transparent plastic packets of crystals (exh P15A (1–11) and P16A) were found in the car. There is however no mention of any car in the second charge. More importantly, the car wherein the aforesaid 12 transparent plastic packets of crystal were found by SP4 was not situated in front of the Teik Kee Bah Kut Teh shop but parked beneath the Blok Rumah Pangsa Taman Segemal, Mak Mandin, Pulau Pinang as testified by SP4. The car was about 120 metres away from the Teik Kee Bah Kut Teh shop.

[45] Simply put, the place of incident of the offence as alleged by the prosecution starkly differed from that stated in the second charge. In *Public Prosecutor v Chung Tshun Tin & Ors* [2008] 1 MLJ 559; [2007] 10 CLJ 527, Hamid Sultan JC (now JCA) held as follows:

> [20] It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy, the exact nature of the charge brought against him, otherwise he may be severely prejudiced in his defence. He can be convicted only on proof of particular offence so specified. For this purpose, the judge cannot go beyond the exact wording of the charge in finding the accused guilty ...

[46] I find that the evidence adduced by the prosecution through SP4 conflicted with the second charge as specified in a material way and this is consequently fatal to the prosecution's case. In a drug possession or trafficking case, the precise specification of the place where the drugs were found and seized is essential and must be proved in accordance with the charge. It is plain here that the prosecution and accordingly the defence have both conducted their respective cases differently from that stipulated in the second charge. This cannot in my view be excused or sanctioned. It is also not curable under s 156 of the Criminal Procedure Code which reads:

> 156 Effect of errors
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> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

In my opinion, s 156 of the Criminal Procedure Code is not contemplated to deal with the situation where the prosecution conducted its case fundamentally at variance and inconsistent from what has been stated in the charge.

[47] Be that as it may, I find the portion of the drugs (exhs P15A (1–11) and

P16A) that were found in the car was not found on the accused or even proximate to him at the material time of the arrest by SP4. They were found concealed beneath the gear console of the car.

[48] According to the prosecution, both the actus reas and mens rea of possession were proved because the accused is the registered owner of the car. He showed SP4 the location where the car was parked after he was arrested in front of the Teik Kee Bah Kut Teh shop and the car was opened using the remote control retrieved from one of the pockets of his short trousers. The passport and the bank book of the accused were also found in the car.

[49] I am satisfied that the accused had the means to access that portion of the drugs physically because the gear console of the car was neither locked or glued and easily removable to retrieve them in the ordinary way by pulling if off. In other words, I find the actus reas proved because the accused had physical control; to wit, the power to deal with the drugs to the exclusion of all other persons following *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 which was adopted by the Federal Court in *Public Prosecutor v Denish a/l Madhavan*. However, I noticed that there is no direct evidence adduced by the prosecution for me to infer that the accused had knowledge of the existence of that portion of the drugs in the car. In other words, the mens rea of the accused has to be established by way of the surrounding circumstantial evidence.

[50] In such circumstances, it is essential that the prosecution must have led sufficient evidence that the accused had exclusive access to the car. In the Supreme Court case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086, Edgar Joseph Jr held as follows:

> Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet, which contained the offending exhibits.
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> In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hands or fingernail clippings were examined for traces of heroin nor was there anything even suspicious about the behaviour of the respondent before or at the time of his arrest; for example, he made no difficulties when arrested.

Moreover in the Court of Appeal case of *Formi Afta bin Ahmad & Anor v Public Prosecutor* [2014] 1 MLJ 838; [2013] 9 CLJ 183, Abdul Malik Ishak JCA held as follows as summarised in the headnotes:

> (2) There must be some degree of custody or control before one is said to have knowledge of that custody and control as together, they would constitute possession under the DDA. Herein, the first appellant was not the sole user of the Proton Wira. The registered owner of the said motorcar was SP4, the mother of the first appellant. Her evidence showed that the Proton Wira was also used by her father, Hj Musa, as a pirate taxi, ie, by ferrying passengers, tourists and foreign workers to the airport. SP4 admitted that other family members could also use the said motorcar. However, the High Court judge did not evaluate SP4's evidence on a maximum basis. Drugs were found in the boot of her Proton Wira, yet the High Court Judge did not evaluate her evidence with a fine toothcomb. This was a serious misdirection. (paras 37, 38 & 53)
>
> (3) The defence of the first appellant was that he had no knowledge of the cannabis in the boot of the Proton Wira as he was not the exclusive user of the said motorcar. The first appellant had also explained in his defence that he was requested by his grandfather, Hj Musa, to use the Proton Wira to fetch the second appellant, a frequent client of Hj Musa, from Kampung Limau Manis, Putrajaya to send him to Segambut. The evidence of the first appellant was corroborated by the evidence of the second appellant who confirmed that he had telephoned Hj Musa. The High Court judge should have invoked the presumption under s 114(g) of the Evidence Act 1950 against the prosecution for its failure to call Hj Musa (*Public Prosecutor v Chia Leong Foo*; refd). (para 55)
>
> (4) As for the second appellant, he was a mere passenger in the Proton Wira, and at the time of the arrest, he was seated on the front left passenger's side. The drugs were found in the boot of the said motorcar. The second appellant neither had exclusive use of the Proton Wira nor was he the owner nor the driver of the said motorcar. There was also no evidence that the second appellant had custody and control of the Proton Wira prior to his arrest or that he had the opportunity or the ability to access the drugs in the boot of the said motorcar and the power of disposal of the drugs in question. The prosecution had failed to establish a prima facie case of possession to warrant the High Court Judge to call upon the second appellant to enter his defence either on a charge of trafficking in cannabis or on a charge of possession of the cannabis. (paras 64, 65 & 66).

Subsequently in the Court of Appeal case of *Thivasalim a/l Abdul Majeed v Public Prosecutor* [2014] 3 MLJ 124; [2014] 2 CLJ 693, Tengku Maimun JCA held as follows:

> [20] We are mindful of the fact that in this case the police had been tailing the car with only the appellant inside it and that no one else was seen in the car. We are also mindful of the fact that the appellant had resisted the arrest and that the appellant's conduct is a relevant consideration to infer knowledge of the drugs (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717).

[21] However, what had escaped the evaluation of the learned judicial commissioner is the recovery of a sweater and a t-shirt on which there exist the DNA of an unknown male. SP10 had given evidence that the DNA profile derived from the sweater and the t-shirt did not match the DNA of the appellant.

[22] It cannot be denied that the sweater (P64) and the t-shirt (P66) were proximate to the drugs. The presence of the DNA on the sweater and the t-shirt recovered from the boot of the car established that at least two other individuals were connected to the car. It is the duty of the prosecution to exclude the possibility of other individuals as not having access to the car and/or have anything to do with the drugs and it is important for the learned judicial commissioner to ask herself whether anybody else had used the car before the arrest of the appellant. The learned judicial commissioner had not directed her mind to this aspect where it is imperative for the prosecution to exclude the possibility that other individuals could not have had custody or control of the car in order to prove possession (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 1 CLJ 39; [1992] 1 CLJ Rep 265; *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1).

[51] Consequently and notwithstanding that the accused is the registered owner of the car and had the remote control to open it at the time of his arrest, I am convinced as alluded by the defence that it is inconclusive the accused had exclusive access and usage of the car because there was also another set of car keys of an Audi car found in the car. There is therefore likelihood that the car was not accessible and used by the accused alone. Both the car and the Audi car might have shared usage between the accused and other persons. Consequently, it could not be safely ascertained that it was the accused who had placed that portion of the drugs beneath the gear console of the car. In this regard, SP5 the investigating officer had failed to thoroughly investigate into the users of both the car as well as the Audi car. She was not even aware that the siblings of accused; to wit, Thi Jiang Ling and Thi Jun Teng also used the car as claimed by the accused. Inadequate investigation by SP5 on this aspect is fatal to the prosecution's case as held by the Supreme Court case of *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 and in the later Court of Appeal case of *Ghasem Gharezadehsharbiani Hassan v Public Prosecutor* [2014] 5 MLJ 433; [2014] 1 LNS 752. In the absence of proof of exclusive car access, the accused could not have the knowledge or mens rea of the existence for that portion of the drug's concealed in the gear box console.

[52] Consequently, I find and hold that the prosecution has failed to prove that the accused was in possession of that portion of the drugs on maximum evaluation.

[53] For the foregoing reasons, I therefore rule that the prosecution has failed to prove a prima facie case against the accused in respect of the second charge and he is accordingly discharged and acquitted.

Accused discharged and acquitted on the second charge.

Reported by Nabilah Syahida Abdullah Salleh